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Supreme Court, U. S.
FILED
JUN 21 1972
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71-1662

Supreme Court of the United States

No._____

ATLANTIC-RICHFIELD COMPANY,
Petitioner

v.

DREW CHERRY AND FORREST MULLICAN
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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INDEX

	PAGE
CITATIONS	i
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
First Question Presented For Review	4
Argument	4
Second Question Presented For Review	13
Argument	13
Third Question Presented For Review	17
Argument	17
Fourth Question Presented For Review	20
Argument	20
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDICES	25

CITATIONS

CASES

Arnold v. Panhandle & S.F.R. Co. 353 U.S. 360, 77 S. Ct., 840, 1 L. Ed. 2d 252	10
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines; 369 U.S. 355 (p. 364); 82 S. Ct. 780, (p. 786); 7 L. Ed. 2d 798	10
Chicago, R. I. & T. R. v. Steph 404 F. 2d 291	10
City of Beaumont v. Graham 441 S.W. 2d 829 (S. Ct., 1969)	5,15

Delhi-Taylor Oil Corp. v. Henry 416 S.W. 2d 390 (Tex. Sup. Ct., 1967) 19
Furst-Edwards & Co. v. St. Louis S.W. Ry. Co., 146 S.W. 1024 (CCA., 1912, writ of err. den.) 14
Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803 (1924) 19
Gulf Oil Corp. v. Kenneth C. Bivens, 276 F. 2d 753 (p. 756) 17,18,19
Halepeska v. Callihan Interest, Inc. 371 S.W. 2d 368 (Tex. Sup. Ct., 1963) 15
Hammond v. City of El Dorado Springs, 362 Mo. 530, 242 S.W. 2d 479, 31 A.L.R. 2d 1367 (1951) 15,16
Lowery v. Clouse 348 F. 2d 252 10
Martin v. Gulf States Utilities Co. 344 F. 2d 44 9
Ratay v. Lincoln National Life Insurance Company, 378 F. 2d 209, cert. denied; 88 Sup. Ct. 472, 389 U.S. 973, 19 L. Ed. 2d 465 9
R. B. Company v. Aetna Insurance Company, 299 F. 753 9
Scott v. Isbandsten Company 327 F. 2d 113 (1964) ... 6
Skeoch v. Ottley 377 F. 2d 804 9
Waterman S.S. Corp. v. David 353 F. 2d 600, cert. denied; 88 Sup. Ct., 1863; 384 U.S. 972, 16 L. Ed. 2d 683 9
Wood v. Kane Boiler Works, 150 Tex. 191, 238 S.W. 172 15

STATUTES

Title 28, U.S.C.A., Sec. 1254(1) 2
Federal Rules of Civil Procedure
Rule 49 6
Commentaries (under Rule 49) 10

Federal Rules of Appelate Procedure (28 U.S.C.A.),
Fifth Circuit Local Rule 21 20,22
Supreme Court Rules (28 U.S.C.A.), Rule 19 20

TEXTS

31 A.L.R. 2d 1375 (p. 1381) 14
Restatement, Torts, Sec. 343 18

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause, and its denial of Petition for Rehearing.

Opinions Below

A copy of the opinion rendered by the Court below on April 13, 1972, is attached hereto as Appendix I. The order of the Court below overruling Petition for Rehearing on May 8, 1972, is attached hereto as Appendix II.

Jurisdiction

This Honorable Court has jurisdiction over this Application under Title 28, U.S.C.A., Section 1254(1).

Questions Presented

1. Did the action of the trial Court in refusing to accept the original verdict of the jury in answer to special interrogatories deprive the defendant of trial by jury in contravention of the seventh amendment of the Constitution of the United States?

2. Did the evidence in the trial Court establish as a matter of law that the defendants owed no duty to the plaintiffs?

3. Did the finding of the jury in the trial Court that the defendant did not fail to warn the plaintiff or its employer of alleged defects in the premises entitle the defendant to judgment in its favor?

4. Is the summary disposition of two of Petitioner's basic questions of law by the Court of Appeals such a departure from accepted and usual course of judicial procedures as to call for this Court's exercise of its power of supervision?

Constitutional Provisions Involved

The constitutional provision involved in this cause is Amendment Seven to the Constitution of the United States. (Appendix III).

Statement

Petitioner was the defendant in the trial Court and shall be referred to as defendant in this brief. Respondents were plaintiffs in the trial Court below and will be so referred to in this brief. The nature of the case is that plaintiffs were employees of Ellerbee Brothers (who shall hereinafter be referred to as employer or contractor), which company entered into a contract with the defendant, ATLANTIC-

RICHFIELD COMPANY, for the repair of a steel fuel storage tank owned by defendant and located upon premises owned by defendant. While engaged in the repair of such fuel storage tank, a portion of the roof thereof, upon which the plaintiffs were working, collapsed, and the plaintiffs fell some forty (40) feet to the concrete floor of such tank, sustaining personal injuries. Intervenor arrived at a compromise settlement of plaintiffs' workmen's compensation claim, and thereafter plaintiffs brought a third party action against defendant asserting that their injuries were caused by the negligence of the defendant. Texas Employers' Insurance Association intervened to recoup its payments under the Texas Compensation Law.

Trial was to a jury. The cause was submitted to the jury on special interrogatories along with an oral charge concerning the law of the case. In response to such interrogatories, the jury found that the defendant was negligent in (a) failing to provide a reasonably safe place for the plaintiffs to perform their work on the storage tank in question, and (b) failing to adequately inspect the storage tank for dangerous conditions, which were known to the defendant or should have been known to the defendant by the use of ordinary care, and which were not open and obvious to the plaintiffs or their employer, and further found that the defendant had *not* failed to warn the plaintiffs of dangerous conditions, which were known to the defendant or should have been known to the defendant by the use of ordinary care, which were not obvious to the plaintiffs in the performance of their work. They found that the negligence above referred to was a proximate cause of the plaintiffs' injuries. They further found that the plaintiffs' injuries arose from or were intimately connected with defects in the premises, which their employer, Ellerbee Brothers, Inc., had undertaken to repair. They found damages for the plaintiff, DREW CHERRY, in the sum of Ten Thousand and no/100 Dollars ($10,000.00), and for the plaintiff, FORREST MULLICAN, in the sum of One Hundred Fifty Thousand and no/100 Dollars ($150,000.00). The trial judge took the view that the findings of the jury in answer to

Interrogatory No. 3 (that the plaintiffs' injuries arose from or were intimately connected with defects in the premises which their employer had undertaken to repair) was in conflict with the remainder of the verdict and instructed the jury in effect that he assumed that their intention was to award plaintiffs damage since they had answered the damage issue, and if such was their intention, that they would have to change their answer to Interrogatory No. 3 from "Yes" to "No." The jury thereupon retired and changed their answer to such interrogatory, and returned their verdict into Court. At the request of counsel for defendant, the jury was polled and unanimously stated that their original verdict in response to Interrogatory No. 3 was "Yes," and that after being sent back by the Court that they changed their answer to "No." Based upon the changed verdict of the jury, the Court entered judgment for the plaintiffs and against the defendant in the amounts stated above.

The Special Interrogatories submitted to the Jury are contained herein as Appendix IV, and the pertinent portions of the oral charge of the Court are contained herein as Appendix V.

First Question Presented For Review

DID THE ACTION OF THE TRIAL COURT IN REFUSING TO ACCEPT THE ORIGINAL VERDICT OF THE JURY IN ANSWER TO SPECIAL INTERROGATORIES DEPRIVE THE DEFENDANT OF TRIAL BY JURY IN CONTRAVENTION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

Argument

The law is well settled in the State of Texas that the owner or occupier of premises who engages a contractor to make repairs on such premises, owes no duty to the employees of such a contractor with regard to defects in such premises which the contractor has undertaken to repair. If the injuries complained of arise from or are intimately connected

with defects which their employer has undertaken to repair, there is no liability on the part of the owner or occupier of premises to the employees of such a contractor. *City of Beaumont v. Graham*, 441 S.W. 2d 829 (S. Ct., 1969). Obviously neither the trial Court nor the Court of Appeals in this case have any quarrel with the above-stated rule of law. This is apparent because both Courts have considered that the original finding of the jury in response to Special Interrogatory No. 3, in which the jury found that the plaintiffs' injury did so arise from or were intimately connected with defects which their employer had undertaken to repair, was in conflict with what said Courts have considered an "award of damages" made by the jury in response to Special Interrogatory No. 4. The only way that these findings can in any wise be considered to be in conflict is by admitting that the finding in response to Special Interrogatory No. 3 would defeat the plaintiffs' right to recover, and by considering Special Interrogatory No. 4 as an "award" of damages.

The whole thrust of the defendant's position in both the trial Court and the Court of Appeals is that there was not a conflict between these two findings; and, that therefore, the verdict as initially rendered by the jury should have been accepted, the law applied to the findings of fact thereby made, and judgment rendered in favor of the defendant that the plaintiffs take nothing. The *Federal Rules of Civil Prodedure* provide for three methods of submitting a case to a jury. The first is a standard general verdict in which the Court gives a charge on the facts and the law to the jury thereby explaining to the jury what they must believe as a fact in order to find for the plaintiff, and alternatively, what they must believe as facts in order to find for the defendant and explaining such matters of law as are necessary for the jury to reach a conclusion; and then, furnish the jury with verdict forms essentially as follows: "We, the jury, find for the defendant" or "We, the jury, find for the plaintiff and assess his damages at $_____." The other two methods of submission involve special interrogatories. These two methods of submission are set forth in Title 28,

U.S.C.A., *Federal Rules of Civil Procedure*, Rule 49 (a) and 49 (b).[1] This case was *not* submitted under Rule 49 (b) providing for "General Verdict Accompanied by Answer to Interrogatory" for the reason there was no forms for a general verdict submitted to the Jury. This point was clearly covered in the case of *Scott v. Isbrandsten Company*, 327 F. 2nd 113 (1964), in which the Court of Appeals for the Fourth Circuit said:

> The Jury was not instructed to bring in a general verdict either for or against either party, but only to answer Special Interrogatories, and no form of general verdict was provided for jury use. Therefore, the Special Interrogatories must be treated as having been submitted pursuant to Section (a) of Rule 49, which provides for fact finding.

While it may be conceded that if this case had been submitted under Section (b) of Rule 49, and the Jury had found as a fact in answer to a Special Interrogatory, a fact which would absolve the defendant of liability and had answered a general verdict "We find for the plaintiff," that there may have been a conflict. Such is not the case before this Court. The jury did not "find for the plaintiff." All that the jury was called upon to do in response to Special In-

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[1]Rule 49 provides as follows: Rule 49, Special Verdicts and Interrogatories: (a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. In so doing the court omits any issue of fact raised by the pleadings or by the evidence.

terrogatory No. 4 was to find how much damage, if any, the plaintiffs had sustained. How much damages has been sustained is a *fact* which exists without regard to who may be liable for such damages. Perhaps the classic example of how one finding of *fact* may make all other findings of fact totally immaterial is in the case of a trespasser upon the land of another. It is hornbook law in all jurisdictions that a landowner owes no duty to exercise ordinary care with regard to a trespasser; whereas, on the other hand, a landowner has a duty to exercise ordinary care to an invitee. The crucial fact issue in such cases, therefore, always turn on the status of the party seeking recovery, that is to say, was he an invitee or a trespasser? Regardless of how many acts of negligence the landowner may be guilty of and regardless of how much damage may have been sustained if the jury finds as a *fact* that the injured party was a trespasser, he cannot recover. In the pure general verdict submission, the trial Court would give instructions to the jury telling them in effect if you find that the plaintiff was a trespasser, you shall "find for the defendant," or, on the other hand, if you find that the plaintiff was an invitee and that the landowner was guilty of negligence proximately causing damages to the plaintiff, you will "find for the plaintiff," and assess his damages in accordance

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each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment of the special verdict. (b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers

with the instructions given by the Court. Under such a submission, obviously no conflict could arise.

In a submission under sub-section (b) of Rule 49, the trial Court might submit specific interrogatories to the jury inquiring (1) as to the status of the plaintiff, that is invitee or trespasser; (2) as to various acts of negligence of the landowner; (3) whether such acts were a proximate cause of injury to the plaintiff; and (4) the amount of damages sustained by the plaintiff. In addition, general verdict forms along the line "we find for the defendant" or "we find for the plaintiff in the amount of $_____" would likewise be submitted. Under this form of submission, a conflict could arise between a finding in answer to a special interrogatory that the plaintiff was a "trespasser" and a general verdict in favor of the plaintiffs. This would then bring into play the various rules and case law having to do with the manner of reconciling such a conflict.

Under the pure special interrogatory submission provided for in Rule 49 (a), the *only* conflict which could arise would be if the findings of *fact* by the jury were in conflict with one another. Such would not be the case in our hypothetical trespasser situation. There is no conflict between a finding that a plaintiff was a trespasser and another finding of fact that the same plaintiff had sustained

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and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

damages. The two are in no way inconsistent with one another. The very same thing is true with regard to the case before this Honorable Court. There is no conflict between a finding that the plaintiffs' injuries arose from defects, which his employer had undertaken to repair, and another finding as a *fact* that the plaintiffs had sustained damages. It is not within the discretion of the trial Court to attempt to find some inconsistency, and therefore, refuse to accept the verdict. On the contrary, the rule has been stated thusly:

> Where there is a view of case that makes jury's answers to special interrogatories consistent, they *must* be resolved that way. (emphasis added).

Ratay v. Lincoln National Life Insurance Company, 378 F. 2d 209, cert. denied, 88 Sup. Ct. 472, 389 U.S. 973, 19 Lawyers Ed. 2d, 465 Other cases make the duty on the trial Court equally mandatory.

> Where there was view of case that made jury's answers in special interrogatories consistent in defamation case, they were *required* to be resolved in that way. (emphasis added). *Skeoch v. Ottley*, 377 F. 2d 804, and

> Before a court can disregard the jury's special verdict and remand case for new trial, they *must* whenever possible harmonize jury's answers to special interrogatories. (emphasis added). *Waterman S.S. Corp. v. David*, 353 F. 2d 600, cert. denied, 88 Sup. Ct., 1863, 384 U.S. 972, 16 Lawyers Ed. 2d 683.

> And court *should* make all reasonable efforts to reconcile apparently inconsistent answers in special verdict. (emphasis added). *Martin v. Gulf States Utilities Company*, 344 F. 2d 44, and

> The court is *compelled* to reconcile apparently contradictory conflicting answers to interrogatories. (emphasis added). *R. B. Company v. Aetna Insurance Company*, 299 F. 2d 753.

Furthermore, the failure on the part of the trial Court to

accept findings of fact made by the jury when any theory of the case will allow him to do so is in contradiction of the Seventh Amendment to the Constitution of the United States.

In the case of *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 at page 364, 82 S. Ct. 780, at page 786, 7 Lawyers Ed. 2d 798, this Honorable Court said:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they *must* be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent result in a collision with the seventh amendment.

Citing *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S. Ct. 840, 1 Lawyers Ed. 2d 889.

The only possible way that it can be considered a conflict between the jury's answer and response to Interrogatory No. 3 (to the effect that the injuries arose out of defects which plaintiffs' employer had undertaken to repair) and a finding of damages in answer to interrogatory No. 4 would be to *assume* that the jury *intended* to award the plaintiffs some amount of damages. The trial Court under the cases cited above was not warranted in arriving at such an assumption. In the first place, the recommended procedure as stated by the Appelant Courts is that in submitting cases on purely special interrogatories as provided by Rule 49 (a), the very purpose is that the jury may answer specific questions of fact without regard to their legal effect. See *Lowery v. Clouse*, 348 F. 2d 252, and *Chicago, R. I. & T. R. v. Steph*, 404 F. 2d 291. Also see the "Commentaries" under Rule 49 in U.S.C.A. wherein it is said among other things:

> Instead of attempting to understand the court's charge, the jury may devote its entire efforts to the task of answering definite questions of *fact*. (emphasis added).

As a necessary corollary to the rule that the Courts have a

duty to reconcile answers to special interrogatories, if at all possible, it likewise follows that the action of the trial Court in this case in *assuming* a conflict where none existed and instructing the jury to retire and change their answer is in contravention of the seventh amendment. The jury originally found as a *fact* that the plaintiffs' injuries arose from defects which their employer had undertaken to repair. This finding of fact, under the law of the State of Texas (and most other jurisdictions) relieves the defendant of any duty to the plaintiff and thereby made all other findings of *fact* including the *fact* that the plaintiffs had sustained damages, wholly immaterial.

Nor is the cursory disposal of this question by the Court of Civil Appeals in any way proper. In the first place, the Court's statement to the effect that "the instructions of the Court *explicitly* charged the jury that it should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect, the workmen were being employed to repair" is a misstatement of the record. The whole of the Court's instructions in this regard are set forth as Appendix V. The specific portions which are pertinent hereto are as follows:

> Therefore, the court will instruct you that if you find from a preponderance of the evidence that the plaintiffs' injuries arose from or were intimately connected with the defects in the premises which their employer, Ellerbee Brothers, Inc., are undertaking to repair, you will answer Interrogatory No. 3 "Yes", and find in favor of the defendant and against the plaintiff.

Except in the manner in which they answered the Special Interrogatory submitted to them, either as contended for by the plaintiff or as contended for by the defendant, THERE WAS NO PLACE TO "FIND IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF." To put it another way, the only way that the above quoted instruction could possibly have been construed by the jury was that the court was referring to the manner in which they answered these Special Interrogatories. The only other place in the court's

instructions that this point was touched upon was the following language, which continued immediately after the language above quoted:

> Now, if you find from the preponderance of the evidence that the plaintiffs are entitled to recover damages as a result of some act or omission of negligence, you do not have to find all of the acts or omissions of negligence which the court has charged you as existing, but you merely have to find at least one of the acts or omissions of negligence as the plaintiffs have contended for, that is failure to provide a reasonably safe place to work, failing to adequately inspect the storage tank, or in failing to warn the plaintiffs of the dangerous conditions, and you find any one of these acts or omissions of negligence *against the defendant in favor of the plaintiffs*, and you find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers, *had undertaken to repair*, then you will find in favor of the plaintiff and give your attention to the issue of damages. (emphasis added).

Again, since there was no place in the jury's charge for the jury to "find in favor of the plaintiffs and against the defendants" or vice versa, except so far as the manner in which they specifically answered the interrogatories, it is quite obvious that the jury was not "explicitly charged" that it "should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect the workman were being employed to remedy."

In summary, the jury unanimously found as a *fact* that the defendant owed no duty to the plaintiffs. The jury was polled, and each and every juror individually stated that his answer to Interrogatory No. 3 initially had been "yes", but that subject to the trial Court sending them back to the jury room because of some alleged "conflict" that then and only then had their answer to such interrogatory been "no."

This action on the part of the trial Court has clearly deprived the defendant in this cause of a trial by jury contemplated by the Seventh Amendment of the United States Constitution.

Second Question Presented For Review

DID THE EVIDENCE IN THE TRIAL COURT ESTABLISH AS A MATTER OF LAW THAT THE DEFENDANTS OWED NO DUTY TO THE PLAINTIFFS?

Argument

It was the position of the defendant in the trial Court and in the Court of Appeals that the undisputed and uncontradicted testimony in the trial Court established that the plaintiffs' injuries arose out of or were intimately connected with a defect in defendants' premises, which plaintiffs' employer had undertaken to repair, and that therefore, defendant was entitled to instructed verdict because it owed no duty to the plaintiffs. The testimony bearing upon this question can be summarized as follows. Neither of the injured plaintiffs was in a position to nor were they called upon to testify as to what caused the roof of the tank upon which they were working to collapse. All they knew and all they testified to was that while working on the roof of the tank, it did collapse, allowing them to fall to the floor of the tank. The only testimony produced as to what caused the roof to collapse was that of a superintendent of defendant who had made an inspection subsequent to the occurrence and had concluded that the cause of the collapse was that some bolt securing the supporting structures of the tank had broken, allowing the structural members to fall causing the collapse. That the work of plaintiffs' employer would have included the repair or replacement of these bolts was established by the undisputed testimony of the foreman for plaintiffs' employer, who testified that their work would have included the repair or replacement of all the structural members of said tank including the columns, girders, beams, *and bolts*". THERE WAS NO OTHER TESTIMONY BEARING UPON THE DUTY OF PLAINTIFFS' EMPLOYER TO REPAIR THESE DEFECTS.

In view of the trial Court and the Court of Appeals' handling the question of "conflict", it will be assumed that both of said Courts were of the opinion that the law was as contended for by the defendant, to-wit, that if the plaintiffs' injuries arose from a defect which their employer had undertaken to repair, there was no liability. If such was not the case, then obviously there could be no "conflict" under any circumstances. However, a brief discussion of the law in this regard is thought to be in order.

It is axiomatic that a cause of action based upon negligence consists of four (4) elements, all of which must be present to sustain the cause of action. They are (1) some duty owed by the defendant to the plaintiff, (2) a negligent breach of that duty, (3) that the breach is a proximate cause of (4) damages to the plaintiff. This proposition was perhaps best stated in the Texas cases by the Court in *Furst-Edwards & Company v. St. Louis S.W. Ry. Co.*, 146 S. W. 1024, (Court of Civil Appeals, 1912, writ of err. denied) in the following language:

"That the right of recovery for injuries resulting from negligence is based upon the violation of duty is no invention of the writer. It is so announced in every text-book upon the law of negligence, and is found by direct announcement or by necessary implication in every well-considered case on this subject....The inquiry in each case of alleged damages is, What was the legal duty of the defendant under the circumstances of the case?

Defendant readily concedes that generally speaking a duty exists on the part of a owner or occupier of premises to warn employees of independent contractors of hidden or inherent dangers. It is the defendant's position, however, that this case clearly falls within an equally well-recognized exception to that rule. This exception is set forth in an annotation in 31 A.L.R. 2d 1375, at 1381 as follows:

> An exception to the general rule requiring the owner or occupier of premises (contractors) to furnish a safe place of work to an independent contractor and the latter's employees, the owner or occupier is under no

> duty to protect them against risks arising from or intimately connected with defects of the premises or of machinery or appliances located thereon, which the contractor has undertaken to repair.

The Supreme Court of the State of Texas has repeatedly recognized and adopted this exception as the law of the State of Texas. In the recent case of *City of Beaumont v. Graham*, 441 S.W. 2d 829 (Sup. Ct., 1969), at page 834 quotes the above statement from A.L.R. 2d, and states:

> This Court recognized the exception to an owner's or occupier's duty to an invitee and discussed it at some length in *Wood v. Kane Boiler Works*, 150 Tex. 191, 238 S.W. 172 (1951).

The Court points out that the A.L.R. annotation follows a decision by the Supreme Court of Missouri in *Hammond v. City of El Dorado Springs*, 362 Mo. 530, 242 S.W. 2d 479, 31 A.L.R. 2d 1367, (1951),

> ....in which the Court held that the city was not liable for damages for injuries to an employee of an independent contractor whose contract provided for 'repair' by the contractor of an elevated water storage tank owned by the city. The employee was injured when defective spider rods broke under his weight and he fell. The Court held that the contractor and his employees assumed the risk of all defective conditions, inasmuch as the contract required them to repair all such conditions.

While some cases have used the term "assumption of the risk" or "volenti non fit injuria," the Supreme Court of Texas in *Halepeska v. Callihan Interests, Inc.*, 371 S.W. 2d 368 (Tex. Sup. Ct., 1963) stated that no matter what term is applied to the doctrine, it really boils down to there being no duty when the defects are open and obvious or as well known or should be as well known to the contractor and its employees as to the owner or occupier of the premises.

It is respectfully submitted, therefore, that since the undisputed evidence shows that plaintiffs' employer had

contracted to repair the very defect of which the plaintiffs complain that the defendant herein owed no duty to the plaintiffs and was entitled to judgment as a matter of law.

We feel that the above-quoted language from *Hammond v. El Dorado Springs* with virtually no changes fits this case squarely, to-wit:

> This Court holds that the defendant was not liable for damages for injuries to an employee of an independent contractor whose contract provided for 'repair' by the contractor of a fuel storage tank owned by the defendant. The employees were injured when defective bolts broke under their weight and they fell. This Court holds that the contractor and its employees assumed the risk of all defective conditions, inasmuch as the contract required them to repair all such conditions.

In spite of the foregoing state of the law, and defendant's contentions that the undisputed facts brought this case within such rules of law, the Court of Appeals has disposed of this point with the comment: "The other errors alleged were without merit." This point of law goes to the very heart of any case involving the duties and liabilities of a landowner to the employees of a contractor. That the evidence is as outlined herein, to-wit, that the injuries did so arise, is amply demonstrated by the fact that the jury initially with no difficulty found such to be a fact unanimously and only changed their answer thereto when they were told to do so by the Court. If the evidence does not establish this point as a matter of law and consequently, should not have been submitted to the jury in the first place, then Petitioner respectfully submits that it was incumbent upon the Appellate Court to point out with particularity how the evidence failed in this regard. The defendant's whole case in the trial Court, its Motion for Instructed Verdict, and its Motion for Judgment Non Obstante Veredicto, was fixed upon the theory that it owed no duty to these plaintiffs. Initially a fact finding in the defendant's favor was obtained by the jury. The actions of the trial Court deprived the

defendant of the benefit of such fact finding, the action of the Appellant Court has deprived this defendant of being advised as to how the proof falls short of establishing as a matter of law that this case falls within the no-duty doctrine herein outlined. The effect of the Appellate Court's summary disposition of this point and the one to follow will be discussed in more detail hereafter; however, it is respectfully submitted to this Honorable Court that this point was "not without merit", but on the other hand was controlling of the disposition of this cause.

Third Question Presented For Review

DID THE FINDING OF THE JURY IN THE TRIAL COURT THAT THE DEFENDANT DID NOT FAIL TO WARN THE PLAINTIFF OR ITS EMPLOYER OF ALLEGED DEFECTS IN THE PREMISES ENTITLE THE DEFENDANT TO JUDGMENT IN ITS FAVOR?

Argument

Another point presented to the Court of Appeals for review was that even if the defendant owed some duty to the plaintiff that under the well-recognized law, both in the State of Texas and generally as set out by the Restatement of Torts and as specifically recognized by the Appellate Court below, any duty so owed to an employee of a contractor may be discharged by a warning, and the failure of the plaintiff to obtain a finding of "lack of warning" was fatal to their cause of action, and furthermore, that the undisputed evidence showed that such a warning had been giving, thereby discharging the duty (if any there was) to the plaintiffs. The testimony bearing upon this issue was that defendant's superintendent of inspection had conversed with plaintiffs' employers' foreman prior to the beginning of the work by plaintiffs' employer. The testimony in this regard appears as Appendix VI.

It is the position of the defendant that this testimony clearly establishes that even if the defendant owed some duty to the plaintiffs that this duty was shown to have been discharged as a matter of law. In the case of *Gulf Oil*

Corporation v. Kenneth C. Bivins, decided by the Court of Civil Appeals for the Fifth Circuit in 1960, at 276 Fed. 2d 753, the obligations of a land owner under these circumstances was thoroughly discussed at page 756 thereof. That Court said the following:

> "The liability of the owner or occupier of the premises which harbors a latent, concealed, or inherent defect to the employee of an independent contractor is not absolute and unconditional. It may be discharged by a warning. As set forth in the Restatement.
>
> 'A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> '(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> '(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> '(c) invites or permits them to enter or remain upon the land without exercising reasonable care
>
> '(i) to make the condition reasonably safe, or
>
> '(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services they are entitled to receive, if the possessor is a public utility.'
>
> Restatement, Torts, Section 343."

The Court goes on to say:

> "Warning was given to White (contractor) and to White's foreman under whose direction Bivins was working. The decisive question then is, was the duty of Gulf to Bivins discharged by the warning given to White and his job foreman?"

In holding the duty was so discharged, that Court said, at page 758:

We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property, and *that this duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger.* (Emphasis added).

This case was decided by the Court of Civil Appeals, Fifth Circuit, in 1960, at which time, the comment was made "the Texas precedents are few." If the Court had any reservations that its interpretation of the Texas law might be in error at that time, it should have no such reservations now. The Supreme Court of Texas laid the question to rest *Delhi-Taylor Oil Corporation v. Henry*, 416 S.W. 2n 390 (Tex. Sup. Ct., 1967), at page 393, when it said:

> This holding brings us face to face with the question of whether an adequate warning to an independent contractor or one supervising his work will discharge the duty of the landowner or occupier to warn the employees of the independent contractor; and we hold it will.

The Court went on to state:

> Our holding here is diametrically opposed to the holding made in *Galveston-Houston Elec. Ry. Co. v. Reinle*, 113 Tex. 456, 258 S.W. 803 (1924); and to hold as we do in this case, we must, and do, overrule that decision.

It is respectfully submitted that the testimony shows that the duty was discharged by actually giving adequate warning to the contractor's supervisor, Perry Parker. It is further submitted that even if no warning had been made at all, there would be no liability. Under the holding of the Court of Civil Appeals, Fifth Circuit, in *Bivins*, where it is said that the duty is discharged if:

> Those in charge of the work for the independent contractor are given warning *or have knowledge of the danger.* (Emphasis added).

It is further respectfully submitted that defendant is entitled to judgment on the verdict of the jury in that it was incumbent in order to sustain a cause of action under the theories stated in the Restatement to obtain a finding of failure to give adequate warning, and that the jury found this fact issue against the plaintiffs.

Fourth Question Presented For Review

IS THE SUMMARY DISPOSITION OF TWO OF PETITIONER'S BASIC QUESTIONS OF LAW BY THE COURT OF APPEALS SUCH A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES AS TO CALL FOR THIS COURT'S EXERCISE OF ITS POWER OF SUPERVISION?

Argument

As has been explained in the second and third questions presented for review herein, those issues were disposed of by the Court of Appeals with the comment "the other errors alleged were without merit," under the Fifth Circuit's Local Rule 21. It is the position of Petitioner that the use of that Local Rule 21 in a cause of this import and involving questions of law which are the very heart of any cause of action by an employee of a contractor against the owner or occupier of premises is such a departure "from the accepted and usual course of judicial proceedings....as to call for an exercise of this Court's power of supervision" as provided by Supreme Court Rule 19. The "usual course of judicial proceedings" anticipates that a protection of a litigant against errors of law committed by a trial Court is the right of appeal. On such appeal, the rights of the litigant are thought to be protected in that the appellate Court will hear oral arguments and write an opinion setting forth why the alleged errors of the trial Court do not require a different judgment to be rendered. If an Appellant is of the opinion that his case falls squarely under the facts and law within the then existing rules of law as announced by the Courts of Appellant's State if it be a diversity case, and as that law has been recognized in the Court of Appeals in which such State falls, then it is thought that such an Appellant has a right to be told by the Court of Appeals,

either (1) why the facts of the particular case do not bring it under the law thought to be controlling; or (2) that the law thought to be controlling is either wrong (and thereby overruled or disregarded by the Appellate Court); or (3) that the Appellate Court does not interpret the law to be the same as that contended for by the Appellant. It is the opinion of the Petitioner herein, and it has been so pointed out to the Court of Appeals below THAT AN OPINION CANNOT BE WRITTEN ON THE SECOND AND THIRD QUESTIONS PRESENTED TO THIS HONORABLE COURT WITHOUT DOING VIOLENCE EITHER TO THE FACTS OF THIS CASE OR TO THE EXISTING STATUS OF THE LAW. While Appellant is fully cognizant of the fact that the Court of Civil Appeals for the Fifth Circuit (and presumably for the other circuits) has a problem of disposing of the large number of appeals pending before it, it is respectfully submitted that the summary disposition of these two very important points of law with the notation that they are "without merit" without pointing out in what way they are without merit or in what way the Appellant before said Court had failed to establish the evidence so as to bring its defense within the well-established rules of law effectively denies your Petitioner of the right of appeal. No matter how gross the error of a trial Court may have been, a three-judge panel of the Court of Appeals can brush off such error by stating that it is "without merit," and leave the person aggrieved thereby totally without remedy. On the other hand, if the Appellate Court writes an opinion upon such point, it must do one of two things: Either it must misquote the facts and evidence or it must ignore the law. If it does either, then in a proper Motion for Rehearing, such can be pointed out to the Court; further-more, it would be much simpler to point out such error (in the event the Motion for Rehearing was denied) to this Honorable Court by showing the difference in the evidence as cited by the Appellate Court and that contained in the record or by showing how the Appellate Court misconstrued the law. In this connection, Petitioners would welcome a remand to the Court of Appeals with instructions to hear oral arguments and to write an opinion, for as has been stated before, it is the

belief of your Petitioner that an opinion cannot be reduced to writing with the same results being reached as has heretofore been reached.

Conclusion

Appellant is well aware that this Honorable Court must of necessity limit its review of cases and cannot grant a Writ of Certiorari to every applicant who feels that it has been aggrieved. Appellant is further aware that the cursory disposal of Petitioner's complaint that it was deprived of a trial by jury, and the summary disposition of its contention that it was entitled to judgment as a matter of law, are not conducive to the immediate conclusion on the part of this Honorable Court that the questions involved are of sufficient importance to require review by way of certiorari. However, the whole procedure from trial Court through the Court of Appeals have been such that your Petitioner respectfully submits that it has been deprived of a valuable right under the Seventh Amendment to the United States Constitution in that it has been deprived of a fact finding in its favor by the jury by procedures condemned by this Honorable Court; and that furthermore, that the cursory disposition of these points on appeal by the Court of Appeals has in effect denied this Petitioner of due process of law.

It is submitted that this Honorable Court should grant this Application for Writ of Certiorari in order to correct the errors specifically involved in this cause and, as well, to review the operation of the Court of Appeals for the Fifth Circuit's Local Rule 21, and the standards and criteria in connection therewith.

RESPECTFULLY SUBMITTED,

Fuller, Fuller & McPherson
Attorneys for the Petitioner
3800 Park Lane
Port Arthur, Texas 77640

BY: _____
Jep S. Fuller

Certificate of Service

I, Jep S. Fuller, attorney for ATLANTIC-RICHFIELD COMPANY, hereby certify that on the _____day of June, 1972, I served copies of the foregoing Application for Writ of Certiorari on Respondents by mailing properly addressed with postage prepaid to:

Mr. March H. Coffield, Attorney
P. O. Box 670
Jasper, Texas 75951

Jep S. Fuller

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3330
*Summary Calendar**

DREW CHERRY, ET AL,
Plaintiffs-Appellees,

versus

THE ATLANTIC-RICHFIELD COMPANY,
Defendant-Appellant,
TEXAS EMPLOYERS INSURANCE ASSOCIATION,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 13, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Causalty Co. of N. Y.*, 431 F.2nd 409, Part I (5th Cir. 1970).

PER CURIAM: The court required the jury to return its verdict in the form of answers to special interrogatories. The instructions of the court explicitly charged the jury that it should not reach the issue of damages if it found that the plaintiffs' injuries arose from work intimately connected with the defect the workmen were being employed to remedy. The first verdict both found that the injuries were intimately connected with the defect under repair and returned damage awards for both plaintiffs. Viewed in the most generous way, these answers were wholly inconsistent. It was not error for the court to refuse the answers and return the jury for further deliberation to resolve the conflict. 9 Wright and Miller, Federal Practice and Procedure: Civil 517-18 (1971). The other errors alleged were without merit. AFFIRMED. See Local Rule 21.[1]

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[1]See *NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

APPENDIX II

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3330
*Summary Calendar**

DREW CHERRY, ET AL,
Plaintiffs-Appellees,

versus

THE ATLANTIC-RICHFIELD COMPANY,
Defendant-Appellant,
TEXAS EMPLOYERS INSURANCE ASSOCIATION,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(May 8, 1972)

ON PETITION FOR REHEARING

Before BELL, DYER and CLARK,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX III

AMENDMENT VII–CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX IV

EXHIBIT "E"

Filed June 11, 1971

SPECIAL INTERROGATORIES AND VERDICT OF THE JURY

SPECIAL INTERROGATORIES NO. 1

Do you find from a preponderance of the evidence that the Defendant, The Atlantic-Richfield Company, through its agents; servants, employees, or vice-principals, was negligent in any of the following particulars:

A. Failing to provide a reasonably safe place for the Plaintiffs to perform their work on the storage tank in question?
Answer "Yes" or "No."
ANSWER: Yes

B. Failing to adequately inspect the storage tank for dangerous conditions which were known to the Defendant or should have been known to the Defendant by the use of ordinary care, and which were not open and obvious to the Plaintiffs or their employer?
Answer "Yes" or "No."
ANSWER: Yes

C. Failing to warn the Plaintiffs of dangerous conditions which were known to the Defendant, or should have been known to the Defendant, by the use of ordinary care, and which were not obvious to the Plaintiffs or their employer, and which were dangerous to the Plaintiffs in the performance of their work?
Answer "Yes" of "No."
ANSWER: No

If you have answered either 1A, B or C Interrogatory "Yes," answer the following:

SPECIAL INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the fall of Drew Cherry and Forrest Mullican on August 5, 1968, resulting in their bodily injuries?
Answer "Yes" or "No."
ANSWER: Yes

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that the Plaintiffs' injuries arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers, Inc, had undertaken to repair?
Answer "Yes" or "No."
ANSWER: No

SPECIAL INTERROGATORY NO. 4

What amount of money paid now in cash will fairly, adequately and reasonably compensate Plaintiffs, Drew Cherry and Forrest Mullican, for injuries sustained by them

as a result of their injuries and damages?
Answer in dollars and cents.
ANSWER: For the Plaintiff, Drew Cherry: $10,000
For the Plaintiff, Forrest Mullican: $150,000

VERDICT OF THE JURY

We, the jury, return the above answers to the special interrogatories propounded to us herein as our verdict in this case.

6/11/71
Date

/s/ Walter W. Weber
Foreman of the jury

APPENDIX V

Now, we turn to the issues of the defendant and the defendant contends that the plaintiffs were injured as the result of the particular work which their employer, Ellerbee Brothers Incorporated, contracted to do for the defendant. In other words, that the injuries sustained by the plaintiffs arose from or were intimately connected with defects in the premises which their employer, Ellerbee Brothers, Incorporated, had undertaken to repair.

Now, in this connection, the Court would charge you, the owner of premises such as the defendant herein is liable to the plaintiffs herein, if and only if the owner has:

(a) Knowledge or by the exercise of reasonable care should have discovered a condition which if known to it should have realized would have involved an unreasonable risk to them and;

(b) If they had no reason to believe that they would discover the condition or realize the risk involved therein;

(c) Invited or permitted them to enter or remain on the premises without exercising reasonable care to make the conditions reasonably safe or to warn them of such dangerous conditions.

You are further instructed that adequate warnings to the plaintiffs' employer is to be considered by you as adequate warnings to the plaintiffs. Further, the Court would instruct you in order to find that the conditions of the supporting structures of the storage tank in question was open and obvious, you must find from a preponderance of the evidence that the full extent of the condition with all of its details and surrounding circumstances and the full extent of the dangers thereof was known and fully appreciated by the plaintiffs or their employer, Ellerbee Brothers, Incorporated. Otherwise, the condition is not open and obvious.

Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the plaintiffs' injuries arous from or were intimately connected with the defects in the premises which their employer, Ellerbee Brothers, Incorporated, are undertaking to repair, you will answer interrogatory number three yes, and find in favor of the defendant and against the plaintiffs.

Now, if you find from the preponderance of the evidence that the plaintiffs are entitled to recover damages as a result of some act or omissions of negligence which the Court has charged you as existing, but you merely have to find at least one of the acts or omission of negligence as the plaintiffs have contended for, that is failure to provide a reasonably safe place to work or in failing to adequately inspect the storage tank or in failing to warn the plaintiffs of dangerous conditions and you find any one of these acts or omissions of negligence against the defendants in favor of the plaintiffs and you furthermore find that the work which the plaintiffs' injuries arose from were not intimately connected with the defect in the premises which their employer, Ellerbee Brothers, had undertaken to repair, then you will find in favor of the plaintiffs and give your attention to the issue of damages.

APPENDIX VI

Question: With connection – in connection with any inspections of the tank, which had been made prior to the time that you all started working, it has been shown here by the testimony of all parties that Mr. Rollinson had made some inspections, one or more inspection, of the interior of the tank and structures. Do you recall whether or not you had any conversations with Mr. Rollinson concerning what he found in those inspections?

Answer: Well, yes, yes, sir. Cotton is the man that I usually wind up working with mostly, directly, since he is all over the plant –

Question: Incidently, I am not sure I developed it while he was testifying. You referred to Cotton, that is Mr. Christopher Rollinson?

Answer: Yes, sir, that is true.

Question: In your conversation with Mr. Rollinson regarding the inspections, what did he tell you that he had found in his inspections with regard to structural –

Answer: Well, they knew that the structural was bad and or they pointed this out to me and this was my reason for removing the roof to get in there to work on the structural.

Question: All right, sir. Now, when you use the term "the structural was bad," tell us what you mean, please sir.

Answer: Well, we have uprights which we call columns, we have circular beams which we call girders, and then we have connecting members which we call rafters. And these were all bad, primarily the girders and the rafters were bad, the columns were in reasonably good shape.

Question: All right, sir. Anything further with regard to the structural mechanism or the structural putting together that was discussed?

Answer: Well, the tank had been there for this many years and really you – it is kind of a proposition of just correcting things that we run across and you may run into

other things that may need to be repaired which you will repair.

Question: How are these various members, you referred to girders, rafters, columns, how are they connected to one another?

Answer: They are bolted together.

Question: All right. Was there any discussion with regard to the bolts?

Answer: Yes, sir, it was generally assumed that the bolts would be, some of the bolts would be bad, yes.

Question: All right, sir. Now, this – these areas you personally covered with Mr. Rollinson after his inspection, is that correct?

Answer: This is right, yes. They point out to me the things that they want done and this is what I try to do.

Question: All right, sir. Is it correct to say then, Mr. Parker, that before your company started working on the tank itself that you were aware that there were certain component parts of the structural mechanisms that were defective?

Answer: Very definitely.

Question: And these included in part, the rafters, the girders, the bolts?

Answer: Yes, sir.

Question: Is this correct?

Answer: Yes, sir.